

***United States Court of Appeals  
for the Second Circuit***



**INTERVENOR'S  
BRIEF**



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

TOWN OF DURHAM, NEW YORK AND  
ASSOCIATION FOR THE PRESERVATION  
OF DURHAM VALLEY,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF  
NEW YORK,

Intervenors,

UNITED BROTHERHOOD OF ELECTRICAL  
WORKERS LOCAL 1249,

Intervenors.

BRIEF OF INTERVENOR, POWER AUTHORITY OF  
THE STATE OF NEW YORK ON PETITION TO REVIEW  
ORDERS OF THE FEDERAL POWER COMMISSION

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October 18, 1976

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76-4153  
76-4151

No. 76-4153

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### ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Power Commission correctly determined that it lacks the statutory authority to pay or to order Power Authority to pay the attorney fees and expenses of the Durham petitioners?

2. Assuming that the Federal Power Commission has discretionary authority to pay the attorney fees and expenses of the Durham petitioners, is the exercise of that discretionary authority by the Commission subject to judicial review?

### STATEMENT OF THE CASE

This brief is submitted by Power Authority of the State of New York (Power Authority) in opposition to the petition of the Town of Durham, New York, and the Association for the Preservation of Durham Valley (hereafter Durham petitioners) in Docket No. 76-4153 for review of a final order of the Federal Power Commission (the Commission) issued January 29, 1976, in which the Commission declined to pay or order Power Authority to pay the attorney fees and expenses of the Durham petitioners. In particular, the Commission held that it does not have statutory authority to make such an award, and concluded further that assuming it had such statutory authority, the Durham petitioners failed to make out a case in support of an award of expenses and fees. (R. 7319, A85).

The question whether the Commission has the statutory authority to pay or to require Power Authority to pay the expenses and fees of the Durham petitioners was before this Court in Greene County Planning Board v. FPC, 455 F. 2d 412, cert denied, 409 U.S. 849 (1972) (Greene County I). This Court held that the Commission is without power to pay or award attorneys fees or expenses in this proceeding. 455 F.2d at 426. At that time the Court said:

"Having determined that the petition for review is timely, we find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer Congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings.

". . . [W]e perceive no basis in the terms of the provision [of Section 309 of the Federal Power Act] to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer Congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest. See Clayton Act, 15 U.S.C. § 15; Communications Act of 1934, 47 U.S.C. § 207; Interstate Commerce Act, 49 U.S.C. § 16(2)." (emphasis added)

455 F.2d at 426.

Consequently, this Court held that the Commission was without the requisite statutory authority under the Federal Power Act, 16 U.S.C. § 792 et seq., and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., to pay or require Power Authority to pay the expenses and fees of the petitioners either as they are incurred or at the close of the proceedings. In addition, this Court could find no compelling need for the exercise of its equitable power to award attorney fees based upon the Supreme Court's decision in Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970).

In the period after this Court's decision in Greene County I, Congress has not issued a clear mandate in the form of legislation amending either the Federal Power Act or NEPA to afford the relief requested by Durham petitioners. In addition, the Supreme Court has narrowly circumscribed the equitable power of this Court to award counsel fees in analogous circumstances in Alyeska Service Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). Thus, when faced with the Durham petitioners' exceptions to the Administrative Law Judge's denial of their motion that Power Authority or the Commission pay attorneys fees and expenses of expert witnesses, the Commission was compelled to deny the exceptions of the Durham petitioners. After reference to this Court's decision in Greene County I and the absence of a

specific Congressional mandate authorizing payment of fees and expenses, the Commission stated:

"Upon considering this matter further we do not find that intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenorers represent local towns and landowners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loathe to attempt such an expensive departure from past practice."

(R 7297, A84-5).

In the face of overwhelming authority to the contrary, the Durham petitioners again raise this issue with this Court. Durham petitioners assert that the Commission has the authority to make a fee and expense award and that the Commission erred in denying their request for payment of fees and expenses. It is plain, however, that the argument of Durham petitioners ignores the law of the case established

by Greene County I in the instant proceeding and is based entirely upon an erroneous interpretation of recent opinions of the Comptroller General.

ARGUMENT

I. THE LAW OF THE CASE ESTABLISHED IN GREENE COUNTY I WITH RESPECT TO ATTORNEY FEES IS BINDING ON THE DURHAM PETITIONERS AND PRECLUDES ANY AWARD OF FEES.

Under the doctrine of the law of the case it is well settled that whatever has been decided on one appeal cannot be re-examined on a second appeal brought in the same suit. The first decision becomes the settled law of the case. Thompson v. Maxwell Land Grant & Ry. Co., 168 U.S. 451, 456 (1897); Downie v. Pritchard, 309 F.2d 634, 636 (8th Cir. 1962); Pyramid Life Insurance Co. v. Curry, 291 F.2d 411, 414 (8th Cir. 1961). In Greene County I, the first appeal arising out of the instant proceeding before the Commission, this Court held that the Commission is without authority under the Federal Power Act and NEPA to pay or require Power Authority to pay the expenses and fees of the petitioners either as they were incurred or at the close of the instant proceedings. In this appeal, arising out of the same proceeding before the Commission, Durham petitioners again raise a request with this Court for an award of fees. However, under the doctrine of the law of the case, the

decision of this Court in Greene County I must be followed in this appeal since it is a part of the same proceeding. Only a clear error of law would warrant a departure from Greene County I. 5B C.J.S. Appeal & Error § 1824. In the instant case there is no question of changed circumstances or previous error by this Court. Since this Court's decision in Greene County I, there has been no amendment to either the Federal Power Act or NEPA which could be construed to extend the Commission's power to include the payment or award of expenses or fees. Therefore, this Court's analysis and decision in Greene County I must control the disposition of Durham petitioners' subsequent request for an award of attorney fees in the same suit.

In addition to concluding that the Commission lacked the requisite statutory authority to award attorney fees in Greene County I, this Court correctly perceived that it should not exercise its equitable powers to award attorney fees incurred in a proceeding before a Federal agency on the basis of Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). The correctness of that decision was later confirmed by the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 420 (1975), wherein the Court held that a Federal court has no equitable power to

award attorney fees to the prevailing party absent a specific Congressional mandate to do so. <sup>1/</sup>

Alyeska's progeny demonstrate that an award of attorneys fees in the instant case would be improper. As the Court noted in Rhode Island Committee on Energy v. GSA, 397 F. Supp. 41 (D.R.I. 1975), the recovery of attorney fees in actions arising under NEPA is a matter which must be left to the Congress to determine. Id. at 62-63. See also Wallace v. House, 515 F.2d 619 (5th Cir. 1975); Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315 (4th Cir. 1975); Sabala v. Gillette, 516 F.2d 1251 (5th Cir. 1975); Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975).

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<sup>1/</sup> The Court recognized the continuing validity of the "bad faith" and "common benefit" exceptions to the general American rule that the prevailing party may not recover attorney fees as costs or otherwise. Durham petitioners make no attempt to rely upon such exceptions.

II. EVEN ASSUMING THE COMMISSION HAS DISCRETIONARY AUTHORITY TO REIMBURSE PETITIONERS, THE COMPTROLLER GENERAL'S OPINION NEITHER COMPELS NOR AUTHORIZES THIS COURT TO AWARD ATTORNEY FEES IN THE PRESENT CASE.

To support their contentions that the FPC has the authority to grant attorney fees to petitioners and abused its discretion in the present case by failing to do so, Durham petitioners rely primarily on two opinions of the Comptroller General. See, Brief of Petitioners, at 16-18, 24-26, and Addenda. Neither of these Comptroller General opinions, however, support Petitioners' contentions. Indeed, under the Comptroller General's opinions, the decision by an agency to grant or refuse attorney fees or other financial assistance to selected intervenors is action committed to agency discretion and not subject to judicial review.

The Opinion in File No. B-92288, contained in Addendum A of Petitioners' Brief, states the Comptroller General's opinion that the Nuclear Regulatory Commission would not transgress the limits of its statutory disbursing authority if it voluntarily chose to provide attorney fees or certain other types of financial assistance to selected intervenors in its public licensing hearings. The opinion merely announces the Comptroller General's position that he "would not object to the use of [NRC's] appropriated funds for this purpose." Mimeo, at 4.

In essence, the opinion states the Comptroller General's belief that a voluntary decision by the NRC to dispense appropriated funds to finance intervenors would not be prohibited by the agency's authorizing legislation. It is unclear whether the opinion is consonant with the Supreme Court's decision in Alyeska, supra. In any event, the opinion is limited in its scope and addresses only the propriety of such action by the NRC.

Petitioners assert that by virtue of the Comptroller General's letter to Representative Moss, the initial opinion issued to the NRC now applies to the FPC. In that letter, (Addendum B to Petitioners' Brief), the Comptroller General notes that its opinion is based on an examination of "some" of the statutory authority of nine various agencies including the FPC. Moreover, the Comptroller was unable to consult with members of the FPC to elicit views or comments on the scope of the agency's statutory authority. To be sure, an agency's own interpretation is usually entitled to substantial weight in a court of law and presumably carries even greater weight than the Comptroller General's construction. Of course, the FPC has consistently held that it is without such authority. Thus, in Consolidated Edison Co. of New York, Project No. 2338, the Commission stated:

"Scenic Hudson also moves 'at this time for reimbursement of the expenses

it has incurred to date', totalling \$9229. Consolidated Edison has filed an opposition to the motion. In Power Authority of the State of New York, 46 FPC 1101 (1971), we held that we were without authority to pay such expenses, and we were upheld on the point in Greene County Planning Board v. F.P.C., 455 F.2d 412 (1972). There have been no developments since that date to cause us to act favorably upon the Scenic Hudson request now before use. Our statutory authority has not been modified in any manner relevant to the payment of fees and expenses of intervenors, and we find nothing in recent judicial or administrative decisions to require us to use our appropriated funds to pay the fees or expenses of an intervenor, such as Scenic Hudson, in our proceedings. We therefore deny Scenic Hudson's request for reimbursement."

Con. Ed. Co. of New York, Project No. 2338, Order Denying Motion To Reopen In Full And For Reimbursement (Issued January 15, 1975).

Nevertheless, on the basis of a hurried and superficial inspection of some of the statutory authority, the Comptroller General states that the rationale of the NRC opinion is applicable to all those agencies including the FPC.

But even assuming the applicability of the opinion of the Comptroller General, as thus incorporated to apply to the FPC, the choice of whether to finance intervenors would remain clearly within the agency's discretion. Thus, in the letter to Representative Moss, the Comptroller General cautioned, "[w]e would like to emphasize, however, that it is within the discretion of each individual agency.

to determine" whether to finance a specific intervenor. See, Letter, at 2.

This theme also runs through the initial opinion issued to the NRC, as the Comptroller General carefully avoided taking a position on the desirability, as a matter of policy, of funding intervenors. See, mimeo, at 2. Moreover, the opinion concluded that "only the administering agency" can make the determination whether to pay expenses of indigent intervenors.

To the extent the use of appropriated funds for shifting the burden of attorney fees is not contrary to the applicable law in this case or other restrictions in the agency's authorizing legislation, any decision to finance selected intervenors rests in the sound discretion of the agency. As such, it is not subject to judicial review under Section 10 of the Administrative Procedure Act. 5 U.S.C. § 701(a)(2).

Even if this Court accepts Petitioners' contentions that the FPC has authority, absent a plain Congressional prohibition, to reimburse hearing participants, it does not follow that the agency's refusal is subject to review. Before discretionary action is subject to review, there must be some "law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Yet where Congress has failed to provide any standards (or even to address the issue at

all), it is unclear what "law" there is for the court to apply.

The only standards which might seem applicable are those constituting the various exceptions to the general rule that court litigants must bear their own costs, including attorney fees. As discussed above, however, Petitioners are unable to fit within any exceptions. The Commission and Power Authority have clearly not acted in bad faith. As recognized by both the D.C. Circuit and the Supreme Court in the Alyeska case, use of the "common benefit" theory is inapposite in cases where imposing costs would not spread the costs of litigation among the beneficiaries. Wilderness Society v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974).

Before reaching the conclusion that awarding costs is a matter appropriate for judicial redetermination, the Court should consider the consequences. In every action by a Federal agency, intervenors would apply for reimbursement for costs and attorneys' fees. The agency would perhaps be required to hold a separate hearing just to determine which intervenors were more indigent than others. Moreover, in light of Petitioners' claims respecting their significant contributions to the final decision, the agency would need to assess each petitioner's relative contribution. Disgruntled and disappointed parties would be quick to appeal adverse rulings and seek to persuade a Federal circuit

court of the importance and significance of their witnesses' participation below.

In Kletchka v. Driver, 411 F.2d 436 (2d Cir. 1969), this Court declined to review the termination of a Veterans Administration research grant for development of a plastic implantable heart. The Court reasoned that:

"It would not be feasible for the courts to review decisions by the V.A. awarding or refusing to award research grants. Each such decision involves a determination by the agency with respect to the relative merits of the proposed research projects for which funds are sought."  
Id. at 443.

Similarly, court review of an agency's decision as to reimbursing selected participants would also involve a determination with respect to the relative merits of each intervenor's contribution to the hearing. Given the lack of applicable criteria, it is unclear how a court could review such discretionary decisions.

The FPC has concluded that, even if it had authority to order reimbursement, Petitioners herein have failed to make a case justifying such an award. This discretionary decision is not amenable to review.

Petitioners would adopt as relevant criteria for judicial review the twin criteria relied on by the Comptroller General in stating that disbursement of general funds might be appropriate. These criteria are inapplicable in the present circumstances, since even under the Comptroller

General's own position the choice of whether to engage in such a program, as well as the selection of needy parties, remains entirely in the agency's discretion. See, Letter, at 2.

Of course, despite Petitioners' attempt to invoke the Comptroller General's opinion as controlling authority, the issue whether the NRC may lawfully choose to disburse appropriated funds to finance intervenors has little to do with whether the FPC ought to do so. Nor does the opinion provide support for the argument that this Court should order the FPC to so act. The Comptroller General noted carefully that there was "no question of compelling NRC" to pay expenses. (Emphasis in original.) Yet this is exactly what Petitioners would have the Court do in the present case. To so order would be to involve the Court in myriad determinations as to the relative merit of contributions by each participant in each public hearing. As the Court recognized in the analogous situation of Kletchka, such agency determinations are unreviewably discretionary.

Moreover, in Greene County I, this Court wisely declined, absent clearer Congressional action, to "inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules." 455 F.2d 427. The 94th Congress reported out favorably a bill, S.2715, the Public

Participation in Government Proceedings Act of 1976, which would authorize all agencies to reimburse citizens and groups for expenses incurred in administrative proceedings, when they make "substantial contributions to the full and fair determination of issues by the agency."

See Senate Committee on the Judiciary Report No. 94-863 94th Cong.

2nd Sess. (1976), at 1. Extensive hearings were held in early 1976.

The proposed Act would establish various criteria for eligibility.

See, S. 2715, 94th Cong. 2d Sess. § 2(a), amending 5 U.S.C. § 558.

Where the Congress is considering legislation which would grant the authority contended for by Petitioners, <sup>2/</sup> it would be inappropriate for the Court to inject itself without awaiting that Congressional action, especially where the legislation would establish detailed criteria for eligibility, as well as for judicial review of such awards.

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<sup>2/</sup> Of course, Congress' extensive consideration of that proposed legislation casts grave doubt on the validity of the Comptroller General's opinions and Petitioners reliance thereon.

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's order issued January 29, 1976, denying an award of attorneys' fees and other expenses to Durham Petitioners.

Respectfully submitted,

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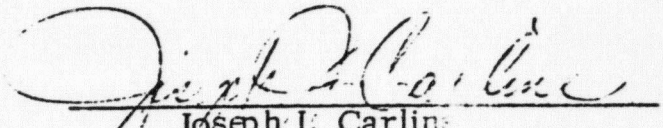
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OF COUNSEL:

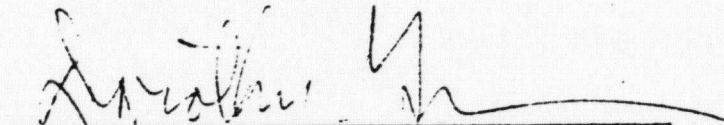
Thomas F. Moore, Jr.  
John C. Mason  
James B. Vasile

2. On October 18, 1976 deponent served the within Briefs of Intervenor on attorneys for all the parties to this proceeding by depositing

a true copy of said in a postpaid properly addressed wrapper in an official  
depository under the exclusive care and custody of the United States Postal  
Service within the State of New York.

  
Joseph J. Carlin

Subscribed and sworn to before me  
this 18th day of October, 1976.

  
Notary Public

DOROTHY GUNN  
Notary Public, State of New York  
No. 41-4526252  
Qualified in Queens County  
Commission Expires March 30, 1979